



STATE BOARD OF EQUALIZATION STAFF LEGISLATIVE BILL ANALYSIS

Date Amended	07/29/03	Bill No:	SB 20
Tax:	Electronic Waste Collection Fee	Author:	Sher and Romero
	Electronic Waste Recycling Fee		
Board Position:		Related Bills:	

This analysis will only address the bill's provisions that impact the Board.

BILL SUMMARY

This bill would:

- Establish the electronic waste collection fee and require a manufacturer or retailer selling a hazardous electronic device in this state, as specified, to collect the electronic waste collection fee from the consumer at the time and point of purchase,
- Establish the electronic waste recycling fee and require a manufacturer of a hazardous electronic device to either prepare and submit a hazardous electronic waste recycling plan or remit to the Integrated Waste Management Board (IWMB) the electronic waste recycling fee on each hazardous electronic device sold by the manufacturer in the state, as specified,
- Authorize the IWMB to solicit and use any and all expertise available in other state agencies, including, but not limited to, the State Board of Equalization (Board), and
- Authorize the IWMB to contract with the Board or another party for the collection of the electronic waste recycling fee.

Summary of Amendments

Among other things, the amendments to this bill since the previous analysis add, delete and revise definitions, add an electronic waste collection fee, and revise the bill's financial provisions.

ANALYSIS

Current Law

Under existing law, there is no fee on the hazardous electronic devices sold in this state.

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Proposed Law

This bill would add Chapter 8.5 (commencing with Section 42460) to Part 3 of Division 30 of the Public Resources Code as the Hazardous Electronic Waste Recycling Act of 2003 (Act).

ELECTRONIC WASTE COLLECTION FEE

This bill would require a manufacturer or retailer selling a hazardous electronic device in this state, as provided, to collect an electronic waste collection fee from the consumer at the time and point of purchase. On and after January 1, 2004, and on and before December 31, 2005, the electronic waste collection fee would be collected in the following amounts:

- Three dollars (\$3) for each hazardous electronic device with a screen size of less than 12 inches measured diagonally.
- Five dollars (\$5) for each hazardous electronic device with a screen size greater than or equal to 12 inches but less than 20 inches measured diagonally.
- Seven dollars (\$7) for each hazardous electronic device with a screen size greater than or equal to 20 inches but less than 28 inches measured diagonally.
- Nine dollars (\$9) for each hazardous electronic device with a screen size greater than or equal to 28 inches but less than 35 inches measured diagonally.
- Ten dollars (\$10) for each hazardous electronic device with a screen size greater than 35 inches measured diagonally.
- Three dollars (\$3) for each laptop or notebook personal computer that is a hazardous electronic device.

The electronic waste collection fee would be collected for all sales of hazardous electronic devices in this state, including, but not limited to, a sale made electronically, over the Internet, telephonically, or by any other means that results in a hazardous electronic device being transported or shipped into the state. A manufacturer or a retailer would be allowed to retain 3 percent of the electronic waste collection fee as reimbursement for any costs associated with the collection of the fee.

The IWMB would be required to establish, and adjust as needed, an electronic waste collection fee schedule on or before January 1, 2006, and on or before January 1 of every second year thereafter. The amount of the fee must be sufficient to generate revenues to make the e-waste recovery payments, as specified, to cover the costs of an authorized collector for collecting, consolidating, and transporting hazardous electronic devices generated in this state.

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ELECTRONIC WASTE RECYCLING FEE

This bill would also require a manufacturer or a registrant of a hazardous electronic device sold in the state to prepare and submit to the IWMB a hazardous electronic waste recycling plan for a hazardous electronic device recycling system that meets specified conditions. As an alternative to complying with the recycling plan requirement, a manufacturer of a hazardous electronic device would be authorized to remit to the IWMB an electronic waste recycling fee on each hazardous electronic device sold by the manufacturer in the state.

On and after January 1, 2005, a manufacturer who elects to pay the electronic waste recycling fee would be required to pay the fee for each hazardous electronic device produced by the manufacturer and sold to a purchaser in this state.

The IWMB would be required to establish and revise as necessary an electronic waste recycling fee schedule for hazardous electronic devices sold to purchasers in this state on January 1, 2005, and annually thereafter.

A manufacturer who elects to pay the electronic waste recycling fee would be required to pay the fee for any sale of a hazardous electronic device produced by the manufacturer, including, but not limited to, a sale made electronically, over the Internet, telephonically, or by any other means that result in a hazardous electronic device being shipped to or used in this state.

The electronic waste recycling fee would be collected by the IWMB pursuant to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code). The Fee Collection Procedures Law contains "generic" administrative provisions for the administration and collection of fee programs to be administered by the Board. The Fee Collection Procedures Law was added to the Revenue and Taxation Code to allow bills establishing a new fee to be collected by the Board to reference this law, thereby only requiring a minimal number of sections within the bill to provide the necessary administrative provisions. Among other things, the Fee Collection Procedures Law includes collection, reporting, refund and appeals provisions, as well as provides the Board the authority to adopt regulations relating to the administration and enforcement of the Fee Collection Procedures Law.

The IWMB would be authorized to contract with the Board or another party for collection of the electronic waste recycling fee.

FINANCIAL PROVISIONS

The electronic waste collection fee and electronic waste recycling fee would be deposited into the Electronic Waste Recovery and Recycling Account (Account), which this bill would create in the Integrated Waste Management Fund. The funds in the Account would be available for expenditure by the IWMB, upon appropriation by the Legislature, for the following purposes:

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- To make electronic waste recycling payments to certified electronic waste recyclers of hazardous electronics waste.
- To provide for costs of the IWMB and the Department of Toxic Substances Control (DTSC) to administer the Act.
- To provide funding to the DTSC to implement and enforce hazardous waste control laws, as described.

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DEFINITIONS

This bill would define the following terms:

- "Manufacturer" - any person who manufactures a hazardous electronic device and sells that hazardous electronic device in this state.
- "Retailer" - a person who sells a hazardous electronic device in the state to a consumer but who did not manufacture the device.
- "Hazardous electronic device" - a cathode ray tube, or cathode ray tube device or any other video display device that is greater than four inches in size and that the DTSC determines, when discarded, would be a hazardous waste, as specified.
- "Consumer" - a purchaser or owner of a hazardous electronic device. The term consumer would not include a manufacturer who purchases specialty or medical electronic equipment, as defined, that is a hazardous electronic device.

MISCELLANEOUS

The IWMB would be authorized to solicit and use any and all expertise available in other state agencies, including, but not limited to, the Department of Toxic Substances Control (DTSC), the Department of Conservation, and the Board.

This bill would also make it unlawful to sell a hazardous electronic device to a consumer in this state unless the IWMB determines the manufacturer of that hazardous electronic device demonstrates compliance with this Act.

The bill would also declare that the imposition of the electronic waste collection fee and the electronic waste recycling fee would not result in the imposition of a tax within the meaning of Article XIII A of the California Constitution, because the amount and nature of the fee would have a fair and reasonable relationship to the adverse environmental burdens imposed by the disposal of hazardous electronic devices and there is a sufficient nexus between the fee imposed and the use of those fees to support the recycling and reuse of these devices.

The bill would become operative January 1, 2004.

Background

In 2002, Senator Sher introduced Senate Bill 1523, which would have placed a \$10 advanced recycling fee on the sale of all new CRTs sold in California. Senate Bill 1523 passed both houses of the Legislature, but was vetoed by the Governor. In his veto statement, Governor Davis said he would rather see California legislation modeled after the product stewardship approach in the European Union, and that he was willing to sign legislation in 2003 that "challenges industry to assume greater responsibility for the recycling and disposal of electronic waste." The veto statement also stated: "I challenge the industry to lead the way and devise an innovative solution for the source reduction, recycling and safe disposal of electronic waste . . . Moreover, we simply must

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demonstrate our leadership and compassion by making sure that California's electronic waste is not irresponsibly sent to underdeveloped nations." In response to the Governor's challenge, Senator Sher introduced Senate Bill 20.

In General

According to information from the IWMB and DTSC websites: "E-waste is a popular, informal name for electronic products nearing the end of their 'useful life.' Computers, televisions, VCRs, stereos, copiers, and fax machines are common electronic products. Many of these products can be reused, refurbished, or recycled. Unfortunately, electronic discards is one of the fastest growing segments of our nation's waste stream. In addition, some researchers estimate that nearly 75 percent of old electronics are in storage, in part because of the uncertainty over how to manage the materials.

"The term "E-waste" is loosely applied to consumer and business electronic equipment that is near or at the end of its useful life. There is no clear definition for E-waste; for instance, whether or not items like microwave ovens and other similar "appliances" should be grouped into the category have not yet been determined. Certain components of some electronic products contain materials that render them hazardous, depending on their condition and density. For instance, California regulation currently views nonfunctioning CRTs (cathode ray tubes) from televisions and monitors as hazardous.

"CRTs, often called "picture tubes," convert an electronic signal into a visual image. A typical CRT contains between two and five pounds of lead. Lead is a toxic substance which may cause lead poisoning and can be especially harmful to young children. If products containing lead are disposed of to the trash, the lead can potentially contaminate the soil and our water supplies. When tested, most CRT's exceed the regulatory threshold for lead and are identified as hazardous waste when discarded. "

COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the author and is intended to enact a comprehensive and innovative system for the reuse, recycling, and proper and legal disposal of hazardous electronic devices, and to provide incentives to design electronic devices to design electronic devices that are less toxic, more recyclable, and that use recycled materials.
2. **Key amendments.** Among other things, the **July 29, 2003**, amendments add, delete and revise definitions, add an electronic waste collection fee, and revise the bill's financial provisions.

The **June 2, 2003**, amendments delete the provision that would have declared that the bill take effect immediately as an urgency statute.

The **May 21, 2003**, amendments that could impact the Board declare that the bill would take effect immediately as an urgency statute and make other technical corrections.

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The **May 6, 2003**, amendments require a manufacturer of a hazardous electronic device to remit to the IWMB a hazardous electronic device recycling and recovery fee on each hazardous electronic device sold by the manufacturer in the state, as specified. This bill would also authorize the IWMB to solicit and use any and all expertise available in other state agencies, including, but not limited to, the Board.

3. **Could the state require out-of-state manufacturers to remit an electronic waste collection fee or an electronic waste recycling fee?** Various Supreme Court cases have focused on states' ability to impose the use tax on out-of-state firms making sales to in-state customers. In 1967 the Supreme Court ruled in *National Bellas Hess, Inc. v. Illinois Department of Revenue*, 386 U.S. 753 (1967), that a firm that has no link to a state except mailing catalogs to state residents and filling their orders by mail cannot be subject to that state's sales or use tax. The Court ruled that these mail order firms lacked substantial physical presence, or nexus, required by the Due Process Clause and the Commerce Clause of the United States Constitution.

In the 1977 case of *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274 {51 L.Ed.2d 326, 97 S.Ct. 1076} the Court articulated that, in order to survive a Commerce Clause challenge, a tax must satisfy a four part test: 1) it must be applied to an activity with a substantial nexus with the taxing State, 2) it must be fairly apportioned, 3) it does not discriminate against interstate commerce, and 4) it must be fairly related to the services provided by the State.

North Dakota enacted anti-National Bellas Hess legislation with the expressed purpose of creating nexus with mail order firms selling to consumers in the state, in an attempt to compel out-of-state retailers to collect the use tax on mail order sales and test the continuing validity of the National Bellas Hess decision. The statute was challenged, and in 1992 the Supreme Court issued a ruling in *Quill Corporation v. North Dakota* (1992) 504 U.S. 298. The Court in *Quill* applied the *Complete Auto Transit* analysis and held that satisfying due process concerns does not require a physical presence, but rather requires only minimum contacts with the taxing state. Thus when a mail-order business purposefully directs its activities at residents of the taxing state, the Due Process Clause does not prohibit the state's requiring the retailer to collect the state's use tax. However, the Court held further that physical presence in the state was required for a business to have a "substantial nexus" with the taxing state for purposes of the Commerce Clause. The Court therefore affirmed that in order to survive a Commerce Clause challenge, a retailer must have a physical presence in the taxing state before that state can require the retailer to collect its use tax.

Based on the above cases, it is questionable whether the state could require an out-of-state manufacturer of a hazardous electronic device, who has no physical presence in California, to remit a fee in order for that device to be sold to a consumer in this state. Further, it should be noted that this bill would define a "manufacturer" to mean any person who *both* manufactures a hazardous electronic

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device and sells that hazardous electronic device in this state. Based on that definition, it is unclear if the restrictions would apply to an out-of-state manufacturer that has no physical presence in the state, since without a physical presence it is possible that a sale of the device that ends up in California would not have been made by the manufacturer in this state.

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4. **It appears that the bill would not authorize the IWMB to contract with the Board to collect the electronic waste collection fee.** Section 42475(e) would authorize the IWMB to solicit and use any and all expertise available in other state agencies, including, but not limited to, the Board to carry out the Act. This section limits the IWMB authority to "expertise," which would not include the right to contract with other state agencies to collect the electronic waste collection fee or the electronic waste recycling fee.

The bill does specifically provide, pursuant to Section 42471(g), the IWMB the authority to contract with the Board for the purpose of collection of the electronic waste recycling fee. The bill does not contain similar language with respect to the electronic waste collection fee. If it is the author's intent that the IWMB be authorized to contract with the Board for the collection of both the electronic waste collection fee and the electronic waste recycling fee, Section 42471(g) should be amended to clarify the author's intent.

5. **Petitions for redetermination and claims for refund.** It is suggested that, for purposes of the electronic waste recycling fee, the IWMB handle the petitions for redetermination and approve the claims for refund based upon the grounds that the IWMB improperly or erroneously calculated the amount of the fee or identified the wrong feepayer. It would be difficult for Board staff to resolve feepayer protests and claims based on actions of another state agency, and in doing so could result in a significant number of additional appeals conferences and Board hearings. Accordingly, the following language is suggested:

42471.5. (a) If the board contracts with the State Board of Equalization to collect the fee imposed in Section 42471, the State Board of Equalization may collect that fee pursuant to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code).

(b) No petition for redetermination of fees determined by the board pursuant to Section 42471(b) shall be accepted or considered by the State Board of Equalization if the petition is founded upon the grounds that the board has improperly or erroneously calculated the amount of the fee pursuant to Section 42471(b) or has incorrectly determined that the person is subject to the fee. Any appeal of a determination based on the grounds that the amount of the fee was improperly or erroneously calculated or that the person is not responsible for the fee shall be accepted by the State Board of Equalization and forwarded to the board for consideration and decision.

(c) No claim for refund of fees paid pursuant to Section 42471 shall be accepted or considered by the State Board of Equalization if the claim is founded upon the grounds that the board has improperly or erroneously calculated the amount of the fee pursuant to Section 42471(b) or has incorrectly determined that the person is subject to the fee. Any claim for refund based on the grounds that the amount of the fee was improperly or erroneously calculated or that the

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person is not responsible for the fee shall be accepted by the State Board of Equalization and forwarded to the board for consideration and decision.

It is also suggested that the bill specify a due date for the fee and authorize the payment of refunds on overpayments of the fee. Similar language should be added to the bill for purposes of the electronic waste collection fee if it is the author's intent that the IWMB be authorized to contract with the Board to collect that fee. Board staff is willing to work with the author's office in drafting appropriate amendments.

6. **Lack of Collection Authority.** Manufacturers and retailers would be required to collect the electronic waste collection fee from consumers at the time and point of sale of a hazardous electronic device and transmit the amounts collected to the IWMB. While proposed Section 42471(g) would authorize the IWMB to collect the electronic waste recycling fee pursuant to the Fee Collection Procedures Law, no such collection authority is included in the bill for the electronic waste collection fee. As such, the IWMB would have no authority to take collection action against a person who fails to collect and/or transmit the fees. Likewise, the bill contains no collection authority for any person with whom the IWMB may contract to collect the electronic waste collection fee.
7. **Electronic waste collection fee would apply to all sales of new and used hazardous electronic devices.** The definition of "hazardous electronic device" does not exclude used devices. Therefore, any cathode ray tube or cathode ray tube device or any other video display device of a certain size would be subject to the electronic waste collection fee. Since a "retailer" would be defined as a person who sells a hazardous electronic device to a consumer, and since "consumer" would be defined as a purchaser or owner of a hazardous electronic device, the *fee would be applicable to any and all sales of such devices, new or used.* The broad application of the electronic waste collection fee and the lack of collection authority would make this fee collectible only to the extent that sellers voluntarily collect and transmit the fee to the IWMB.
8. **Overriding federal government or court actions.** Proposed Section 42485 would prohibit the IWMB from implementing the Act if federal law changes, as provided, or a court holds that the law is invalid. However, the proposed section does not indicate what would occur should the Act be implemented prior to a change in federal law or court action. Would the provisions of the Act cease to be effective in such a case? If that is the author's intent, Section 42485 should be amended to cover the cessation of the Act in the event the contingencies occur in the future. For example, the bill should provide for what would happen to the amounts on deposit in the Electronic Waste Recovery and Recycling Account, and address how refunds would be made.

In addition, proposed Section 42485 should be rewritten to more closely reflect the language of the bill. That is, it should (1) refer to "hazardous electronic devices" instead of "cathode ray tube devices", and (2) refer to "manufacturers" instead of

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"cathode ray tube device manufacturers, retailers, handlers, processors and recyclers".

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9. **Other technical concerns.** Board staff has several concerns with the fee provisions of this measure, which could hinder the Board's ability to collect the proposed fees. Among others, the concerns that the author may wish to amend are as follows:

- The definition of "hazardous electronic device" should be clarified to avoid confusion. Specifically, the definition provides that a hazardous electronic device would be a cathode ray tube, cathode ray tube device, or any other video display device that is greater than four inches in size. How is the device measured and what is it measuring? Furthermore, the definition also provides that the DTSC would determine whether a cathode ray tube, cathode ray tube device or any other video display device is a hazardous waste, as described. However, it is not clear when the DTSC would make that determination.
- The definitions for "hazardous electronic device" and "hazardous electronic waste" are identical. To avoid confusion, it is suggested that only one of the terms be used throughout the bill.
- The term "retailer" is defined as a person who sells a hazardous electronic device in the state to a consumer but who did not manufacture the device. As such, the term "person" should be defined.
- Section 42465 would make it a crime for any person to sell a hazardous electronic device to a consumer in this state, unless the IWMB determines that the manufacturer of that device demonstrates compliance with the Act. In other words, any sale including the sale of a brand new or used television or computer to a purchaser in California is a crime unless the IWMB has found that the manufacturer of the device is in compliance with the Act. As such, if any person sells a television or computer, made by a manufacturer, including an out-of-state manufacturer, who is not in compliance with the Act, to another person, the sale is a criminal act. Furthermore, how would the seller know whether the manufacturer of the device has demonstrated compliance with the Act? Would a list of compliant manufacturers be posted on the IWMB website?
- Section 42471(g) provides that the IWMB could collect the electronic waste recycling fee pursuant to the Fee Collection Procedures Law. However, the IWMB cannot simply use the Fee Collection Procedures Law to collect fee since that law is a collection mechanism specific to the Board. The subdivision goes on further to provide that the IWMB may contract with the Board or another party for the collection of one or more of the fees due under this "section" (Section 42471). However, Section 42471 would only impose one fee - the electronic waste recycling fee.
- The bill refers to a "hazardous electronics device," "hazardous electronic device," and "hazardous electronics waste device." However, the only defined term in the bill is "hazardous electronic device."

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- Section 42474 is not clear who would be liable for civil penalties. For example, who would be liable for civil penalties in a case where a person, other than the manufacturer, sold a hazardous electronic device in this state that is not covered by a hazardous electronic device recovery system or the fee? Also, it appears that the word “not” has been inadvertently omitted from lines 35 and 36 of page 23 and on lines 8 and 9 of page 24. In its current form, the civil liability would apply when the electronic waste recycling fee has been paid rather than when the electronic waste recycling fee has not been paid. The phrase should be amended as follows:

“...or for which the electronic waste recycling fee has not been paid pursuant to Section 42471.”

COST ESTIMATE

This bill does not increase administrative costs to the Board because it only authorizes the IWMB to contract with the Board to collect the electronic waste recycling fee. The IWMB would be required to contract with the Board to perform collection functions related to that fee, and reimburse the Board for its preparation costs to administer that fee as well as the ongoing costs for the Board’s services in actually administering the electronic waste recycling fee. Since it is unknown how many manufacturers would elect to pay the electronic waste recycling fee rather than comply with the recycling plan requirements, it is not possible to accurately determine the costs that the Board would incur to develop and administer the new fee program.

REVENUE ESTIMATE

This measure does not specify the amount of the electronic waste recycling fee. Accordingly, a revenue estimate could not be prepared.

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